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Ontario Labour Relations Board HIGHLIGHTS

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NOTICES TO THE COMMUNITY

PLEASE TAKE NOTICE of the changes to the Board's Rules of Procedure, effective July 28, 2014. The changes are outlined in the attached Document #1.

PLEASE TAKE NOTICE ALSO of related changes to the Board's processes outlined in the attached Document #2.

Job Postings

The Board has posted an ad for two Mediators on the OPS Careers website at:www.gojobs.gov.on.ca (Job ID: 67204). The competition closes on August 1, 2014.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Construction Industry – Jurisdictional Dispute – The work in dispute was the fabrication (at the Large Bore Fabrication Shop at the Bruce Nuclear Generating Station) of steel support stands for electrical panels – The assignment of the work to CUSW was supported by EMC and Bruce Power ("Supporters"); the four union challengers contended the work should have been assigned to a composite crew – The Board found four factors (collective agreement; trade agreements; safety, skills and training; economy and efficiency) to be neutral – In assessing employer practice and area practice the Board first found that neither past field fabrication nor past off-site fabrication was relevant for its determination – The Board then determined that the scope of past practice evidence for both employer and area practice was the previous work assignments at the Large Bore Machine Shop only – The Supporters' past practice totalled 3 work assignments, while the Challengers had 65 – Given that there were no other relevant factors and the criteria of employer practice and area practice favoured the Challengers while the other factors were neutral, the Board found the Challengers had met their burden and found the work in dispute ought to have been assigned to the Challengers – Application granted

BRUCE POWER LP; RE: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers on its behalf and on behalf of Local Lodge 128; and Millwright Regional Council of Ontario United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated Local Unions; RE: Canadian Union of Skilled Workers; RE: EMC Power Canada Ltd.; RE: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736; RE: Power Workers' Union C.U.P.E. Local 1000 - C.L.C.; OLRB File No. 0167-14-R; Dated June, 2014; Panel: Jack J. Slaughter (11 pages)

Bargaining Unit – *Colleges Collective Bargaining Act, 2008* – Employee – Practice

and Procedure – George Brown College made an application for a determination under s. 71 of the *CCBA* that an employee was not a member of the bargaining unit – The parties had previously been before an arbitration board which issued a decision that the employee was not excluded from the bargaining unit pursuant to five factors, however the sixth factor set out in the *CCBA* could only be considered by the Board – The union brought a motion that the Board should adopt the factual findings set out in the arbitration board's decision, otherwise it would constitute an abuse of process – After reviewing the abuse of process doctrine and noting this to be a novel situation, the Board remarked that it would be prudent in the future for litigants to take into consideration the Board's broader jurisdiction to consider all the factors under the *CCBA* when deciding whether to pursue an application under s. 71 of *CCBA*, in that these circumstances raise concerns over the appropriate use of the Board's resources when one considers the potential for substantial factual overlap in both proceedings – The Board ordered the parties to provide more particulars after which the Board would determine which, if any, of the facts cannot be the subject of evidence as they would contradict the factual findings of the arbitration board – Matter continues

GEORGE BROWN COLLEGE; RE: Ontario Public Services Employees Union , Local 557; OLRB File No. 1644-13-M; Dated June 30, 2014; Panel: Roslyn McGilvery (12 pages)

Certification – Construction Industry – Timeliness – The responding party, a Quebec-based company, filed an untimely response to a certification application under the construction provisions – It made three allegations: that the application (which was delivered in English) was void *ab initio* under the *French Language Services Act* and denied it natural justice and procedural fairness; that the project involved maintenance rather than construction work; and that the membership evidence was obtained by fraud – The Board noted its discretion to accept a late response – It agreed that a late response causes prejudice to an applicant but stated that the level of prejudice depends on the issues raised in the response – The Board distinguished these facts from cases where it declined to accept late responses concerning disputes about the composition of the bargaining unit – The Board exercised its discretion to consider the late response, allowing the responding party to pursue the three allegations – The applicant would not suffer any real prejudice if the responding party was permitted to pursue the allegations – The two-day delay in filing the response was minimal – None of the allegations involved information specifically required by subsection 128.1(3) – The fraud allegation can be brought at any time under section 64 – The alleged violation of the *FLSA* was a purely legal argument and the delay in raising it caused no prejudice – The allegation that the project involved maintenance rather than construction caused little prejudice given that the applicant was aware of the work – The responding party was not denied natural justice or procedural fairness for the alleged failure to comply with the *FLSA*, as it was permitted to pursue all three allegations – The Board directed the parties to make submissions concerning these issues – Matter continues

FILTRUM INC. AND/OR FILTRUM CONSTRUCTION AND/OR FILTRUM INC. C.O.B. AS FILTRUM CONSTRUCTION; RE: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; OLRB File No. 0583-14-R; Dated June 11, 2014; Panel: Jesse M. Nyman (10 pages)

Delay – Termination – Unfair Labour Practice – Warren was a former NHL referee terminated in April 2008 – Following his termination, he sought reinstatement from the Board, alleging he was fired as a result of his activities with the NHL Officials' Association (NHLOA) – When that application was dismissed, Warren demanded severance payment from the NHL under the NHLOA Collective Agreement in September 2013 but was denied – The Collective Agreement provided that a released official who pursued legal action against the NHL in connection with the release of his employment was deemed to have waived his right to receive any benefits provided for in the Agreement – Warren argued that the provision was unlawful – In this ULP complaint, Warren claimed that he was discriminated against and penalized by the NHL for bringing the prior reinstatement application – The NHL brought a motion to dismiss on the basis of, *inter alia*, undue delay – A fundamental question for the Board was when this issue crystallized – The Board held that the issue crystallized over 5 years prior when Warren sought reinstatement after receiving the NHL's offer to pay severance in terms which cited the relevant Collective Agreement provisions and were conditional on Warren signing the waiver – The terms of the Collective Agreement and the NHL's position were made clear to Warren when

he was terminated – A reasonable person ought to have known that his options were to either take the severance offered or seek reinstatement at the Board – It would be prejudicial to the NHL to now face more litigation to deal with an issue that could have been raised previously – The Board held that this constituted excessive delay – Where delay is beyond one year, the passage of time is inherently prejudicial to the responding party and the applicant bears the onus of explaining it – Although the application raised an important public policy issue (the scope of the protection afforded under section 87(1)), the Board was not convinced that the applicant provided a compelling explanation for the delay – Application dismissed

NATIONAL HOCKEY LEAGUE; RE: Dean Warren; OLRB File No. 2336-13-U; Dated June 16, 2014; Panel: Eli A. Gedalof (9 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
PCL Constructors Canada Inc. Court No. 240/14	3414-11-G	Pending
Avis Installation Inc. Court No. 226/14	1766-13-R	Pending
Bogdan Koscik Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Court No. 189/14	1375-13-U	Pending
Mary McCabe Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Pending
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	Abandoned June 25, 2014
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	October 28, 2014
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Heard June 12, 2014 Reserved
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13 M43574	1307-10-R	LIUNA Leave to CA Dismissed June 20, 2014
Weihua Shi Divisional Court No. 158/13 35837	0273-10-ES	Seeking Leave to SCC

Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)
EllisDon Corporation Court of Appeal C58371	0784-05-G	October 8, 2014 Court of Appeal
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above